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No. 82-2056

In The

Supreme Court of the United States

October Term, 1983

ESCONDIDO MUTUAL WATER CO., et al.,
Petitioners,

vs.

LA JOLLA BAND OF MISSION INDIANS, FEDERAL ENERGY REGULATORY COMMISSION, SECRETARY OF THE INTERIOR, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

[redacted] SUPPLEMENTAL BRIEF IN OPPOSITION OF RESPONDENTS LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA BANDS OF MISSION INDIANS

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF and SUPPLEMENTAL BRIEF IN OPPOSITION OF RESPONDENTS LA JOLLA, RINCON, SAN PASQUAL, PAUMA AND PALA BANDS OF MISSION INDIANS

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

The Brief in Opposition of the La Jolla, Rincon, San Pasqual, Pauma and Pala Bands of Mission Indians (Bands) was served on August 22, 1983. Approximately one month later, two Briefs were filed by Amici Curiae[1] in

[1]One Brief was filed on behalf of the American Public Power Association, hereafter cited as APPA Brief. The other Brief was filed on behalf of the Colorado River Water Conservation District and the Kings River Conservation District, hereafter cited as CRWCD Brief.

support of the Petition. The Bands seek leave to file a Supplemental Brief to respond to several arguments urged for the first time in these Amici Briefs.

SUPPLEMENTAL BRIEF

1. Both the Amici claim that the plain meaning of the reservation proviso to FPA Section 4(e), 16 U. S. C. § 797 (e), is at odds with the Act's legislative history. APPA Br. at 16-22; CRWCD Br. at 5-6. They rely on statements made during the course of hearings to a 1930 Amendment to the Federal Power Act.

The reservation proviso was included in its present form in Section 4(d) of the Federal Power Act as it was originally enacted in 1920. 41 Stat. 1063, 1065-66. The 1930 Amendment had nothing whatsoever to do with Section 4. It changed only FPA Sections 1 and 2. 46 Stat. 797. Section 1, 16 U. S. C. § 792, removed the Secretaries of War, Interior and Agriculture as members of the Commission and replaced them with five independent commissioners appointed by the President. Section 2, 16 U. S. C. § 793, authorized the Commission to appoint its own staff so that it would no longer have to be dependent on staff work performed by personnel from the Departments of War, Agriculture and Interior. *Compare* Section 2 of the 1920 FPA, 41 Stat. 1063. No one testified or even suggested that the Commission could or should override, modify or reject conditions that the relevant Secretary deemed necessary for the adequate protection and utilization of

reservations.[2] One committee member summarized the bill by stating that it would "not affect in any way the present law with reference to . . . the conditions under which [licenses] are granted." Hearing Before the Committee on Interstate and Foreign Commerce on H. R. 11408, 71st Cong., 2d Sess. 28.

2. Both Amici also perceive problems with obtaining meaningful judicial review of the Secretaries' Section 4(e) conditions, APPA Br. at 12, 26 n. 22; CRWCD Br. at 8, but their concerns are imaginary. A Commission Order denying a license because of the Section 4(e) conditions imposed by the Secretaries plainly would be reviewable under FPA § 313(b), 16 U. S. C. § 825*l*(b). Applicants for licenses surely would be "aggrieved" by Commission Orders dismissing their applications or issuing licenses with unwanted and undesirable conditions and they certainly would have ample incentive to seek judicial review of such orders. The validity of the Secretaries' Section 4(e) conditions, no less than the conditions imposed by the Commission pursuant to FPA § 10(g), 16 U. S. C. § 803(g), will be judged on the basis of the Commission's administrative

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[2]The Counsel for the Commission testified that the Commission could "override the head of a department as to the consistency of a license with the purpose of any reservation." *See* APPA Br. at 9; CRWCD Br. at 6. No one contests the Commission's ultimate authority to make this determination under the explicit language of the first clause of the reservation proviso. It is equally clear under the second clause of the proviso, however, that licenses "shall be subject to and contain" conditions which the relevant Secretary deems necessary for the adequate protection and utilization of reservations. This same division of authority, so clear on the face of the reservation proviso, was also described thirty-four years later in the Report of the Public Land Law Review Commission. *See* Bands' Br. in Opposition at 19-20.

record, not a *de novo* hearing in the court of appeals. *See* Bands' Br. at 2-4, 25-26. If the conditions are not supported by that record, they will be set aside. *See* Bands' Br. at 20 n. 13.

3. In an effort to manufacture an ambiguity in the Federal Power Act and to avoid the plain meaning of the reservation proviso, Amici point to FPA § 6, 16 U. S. C. § 799. APPA Br. at 13-14; CRWCD Br. at 4 n. 3. Section 6 provides that licenses "shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe *in conformity with this Act. . . .*" Emphasis added. The Section goes on to state that "[l]icenses . . . may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice."

Nothing in this general provision either overrides or is the slightest bit inconsistent with the reservation proviso. It certainly cannot be deemed under any reasonable construction to vest authority in the Commission and the licensee to amend or eliminate the Secretaries' Section 4(e) conditions. Any such "reconditioning" by the Commission plainly would not be "in conformity with this Act." *See also,* FPA § 10(g), 16 U. S. C. § 803(g). FPA Section 6 is so far removed from the issues concerning the Secretaries' Section 4(e) powers that it was not mentioned by the Commission in the extensive discussion of that issue in its opinion, Pet. App. 143-47, nor was it cited in the Petition as a major statutory provision involved in this case, Pet. 2; Pet. App. 381-82.

4. Contrary to APPA's contention (Br. at 27-30), the Secretary's Section 4(e) conditions do not constitute an

adjudication of anyone's water rights. The petitioners voluntarily applied for a license to utilize "tribal lands embraced within Indian reservations" and "interests in [Indian] lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws." FPA § 3(2), 16 U. S. C. § 796(2). Their application therefore triggered the statutory obligation of the Secretary of the Interior to formulate and impose conditions deemed "necessary for the adequate protection and utilization" of the reservations. The Secretary's conditions do not adjudicate anyone's rights; they describe what is needed for the adequate protection and utilization of the reservations regardless of the parties' respective water rights or legal entitlements.[3] They are part of "the price which must be paid to secure the right[s]" granted by the license. *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 427-28 (1940). They are contractual in nature, the very opposite of adjudicatory, in the sense that the license can be accepted or rejected as the petitioners' see fit. *See Albrecht v. United States*, 329 U. S. 599, 603 (1947); *California v. FPC*, 345 F. 2d 917, 921-24 (9th Cir. 1965), *cert. denied*, 382 U. S. 941.

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[3]Water would be necessary for the protection and utilization of the reservations even if there were no Winters doctrine (Winters v. United States, 207 U. S. 564 (1908)) and the reservations had no existing legal entitlements to water.

Respectfully submitted,

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